

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

CRL.A.No. 2168 of 2004()

SC.62/2004 OF SPECIAL JUDGE FOR TRIAL OF CASES UNDER
THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT,
THIRUVANANTHAPURAM.
.....

APPELLANTS: ACCUSED

1. K.K.NAUSHAD, S/O.LATE ABDUL MAJEED,
VAYALIL HOUSE,, 36/2541, MOOLAYAIL LANE,
AZAD ROAD, KALLOR, KOCHI-17(PRESENTLY REMANDED
TO THE JUDICIAL CUSTODY).
2. FOUSAL K.K., S/O.LATE ABDUL MAJEED,
VAYALIL HOUSE, 36/2541, MOOLAYAIL LANE,
AZAD ROAD, KALOOR, KOCHI-17(PRESENTLY
REMANDED TO THE JUDICIAL CUSTODY).
3. A.M.SHEREEF, S/O.LATE ABDULLA,
VAYALIL HOUSE, 36/2541, MOOLAYAIL LANE,
AZAD ROAD, KALOOR, KOCHI-17(PRESENTLY REMANDED
TO THE JUDICIAL CUSTODY)

BY ADVS. SRI.M.K.DAMODARAN (SR.)
SRI.M.A.ASIF
SMT.T.V.NEEMA
SRI.T.A.SHAJI
SRI.C.P.UDAYABHANU

RESPONDENT: COMPLAINANT

INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
REGIONAL INTELLIGENCE UNIT, THIRUVANANTHAPURAM,
REPRESENTED BY SPECIAL PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SPL. PUBLIC PROSECUTOR SRI. C.P. UDAYABHANU.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 28/03/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER IN CRL.M.A.NO. 8412 OF 2006 IN CRL. APPEAL
NO. 2168 OF 2004.

DISMISSED

28.3.2007

Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 2168 OF 2004

Dated this the 28th day of March, 2007

JUDGMENT

This appeal is filed by accused Nos.1 to 3 in S.C.No.62/2004 on the file of the Special Judge for trial of cases under the Narcotic Drugs and Psychotropic Substances Act, Thiruvananthapuram. The appellants faced trial for the offences punishable under Sections 21(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the N.D.P.S.Act”).

2. The prosecution case against the appellants was that on 31.7.2003 at about 6.30 a.m. on getting information regarding the conspiracy to send narcotic drugs to Saudi Arabia by Flight AI 927, the Intelligence Officer attached to the Narcotic Control Bureau, Thiruvananthapuram along with PW.5 and other staff proceeded to Thiruvananthapuram International Airport. It is the further case of the

prosecution that at about 8.45 a.m. they saw two persons entering the Departure Terminal each carrying a hand bag who after collecting their boarding passes moved to the emigration counter and after a while they returned to Air India Counter, surrendered their boarding passes and went out and got into the rear seat of an Indica car bearing Registration No.KL-07-AN 756. Thereupon the officials along with two witnesses approached the car and found accused Nos. 1 to 3 and the driver of the car and on questioning accused Nos.1 and 2 admitted that each of the bags contained 1 Kg. of brown sugar. The prosecution further alleged that the bags on examination were found to contain concealed packets and on testing the same, it was found to be heroin. Thereafter the bags were seized and samples were taken for chemical analysis and after recording the statements of accused Nos. 1 to 3 as per Section 67 of the N.D.P.S. Act, they were arrested. Further investigation was carried out by PW.6 and final charge was filed against the appellants for the offences alleged against them. To prove the case against the appellants, the prosecution examined PWs. 1 to 6 and relied on Exts.P1 to P37 as well as MOs.1 to 16. DW.1 was examined on the side of the defence, but no documentary evidence was adduced. On closing the prosecution

evidence, the appellants were questioned under Section 313 Cr.P.C. The appellants denied the prosecution allegations and filed separate statements. Accused Nos. 1 and 2 specifically stated that no contraband articles were seized from their possession and that they went to the airport to go to Riyadh. They also stated that the Intelligence Officers had not complied with the provisions of Section 50 of the N.D.P.S Act and that they were not given an opportunity to exercise their right to have the presence of a Gazetted Officer before conducting search of their body. Accused Nos.1 and 2 further stated that all the documents alleged to have been signed by them and produced by the prosecution were actually created by using force against them and that they were arrested from A.V.M lodge while they went back to the lodge from the airport to collect some documents. Accused No.3 had also stated that no contraband articles were seized from accused Nos.1 and 2 who came to the airport to go to Riyadh. According to him, he came to the airport to see off accused Nos.1 and 2, his step sons, who were leaving for Riyadh and that while he was sleeping in A.V.M lodge, the Intelligence Officers came there, took him into custody and forced him to sign certain papers. All the appellants denied having given any statements under Section 67

of the N.D.P.S Act as alleged by the prosecution and that stated that all the documents produced by the prosecution were concocted ones. However, relying on the prosecution evidence, the trial court found the appellants guilty under Section 21(c), 28 and 29 of the N.D.P.S. Act, convicted them thereunder and sentenced them each to undergo rigorous imprisonment for ten years and to pay a fine of rupees One lakh each and in default of payment of fine, to undergo simple imprisonment for a further period of one year each under Section 21(c) of the N.D.P.S. Act. No separate sentence was awarded under Sections 28 and 29 of the N.D.P.S. Act. Set off was also allowed. The above conviction and sentence are challenged in this appeal.

3. The learned senior counsel Sri. M.K.Damodaran appearing for the appellants had taken the following contentions challenging the judgment of the trial court: (i) the trial court had not appreciated the prosecution evidence in the light of the case put forward by the accused when they were questioned under Section 313 Cr.P.C. as there was no independent evidence adduced by the prosecution to prove the alleged seizure of the contraband articles from the appellants, (ii) the officials had

not complied with the mandatory provisions of the N.D.P.S. Act while conducting search of the body of the appellants and seizing the contraband articles as there is no acceptable evidence that the officers had complied with Section 50 of the N.D.P.S Act while conducting search and seizure and that no legal value can be attached to the evidence of the investigating officer who actually participated in the search and seizure and taking samples of the contraband articles, (iii) the trial court had committed serious error in finding the appellants guilty of the charges relying on the statements alleged to have been recorded under Section 67 of the N.D.P.S. Act without any corroborative piece of evidence, (iv) the trial court went wrong in finding that the contraband articles seized and the samples analysed were heroin as the chemical analyst had not given any admissible opinion with regard to the quantity or purity of the substance analysed by him and Ext.P19 report of the chemical analyst would not prove that the samples analysed were heroin. According to the chemical analyst, the test conducted by him was only colour test and not any other approved test to find out the nature of the substance and (v) even if the entire prosecution evidence is accepted, the appellant can be found guilty only under Section 21(a) of the N.D.P.S. Act

as Ext.P19 report does not contain any data regarding the percentage or purity of diacetylmorphine contained in the contraband articles seized from accused Nos.1 and 2.

4. This Court heard the learned Special Public Prosecutor Sri.C.P. Udayabhanu. appearing for the Narcotic Control Bureau. Relying on the findings entered by the trial court, the learned counsel appearing for the respondent submits that the evidence now adduced by the prosecution is sufficient to find that the appellants committed the offences charged against them. Further, the learned counsel submits that as per Section 67 of the N.D.P.S. Act, the Intelligence Officer of the Narcotic Control Bureau is empowered to record the statements of the accused under Section 67 of the N.D.P.S. Act which itself can be used as a basis for convicting the accused for the charges alleged against them. Further, the learned counsel submits that the evidence of the chemical analyst clearly indicates that the samples analysed by him contained heroin. Hence, as the offence under Section 21 is proved against the appellants, the conviction and sentence ordered against the appellants are justifiable.

5. The prosecution tried to prove th case against the appellants through the evidence of PWs. 1 to 6. PW1 is the detecting officer who had stated before the court below that while he was working as the intelligence Officer of the Narcotic Control Bureau at Thiruvananthapuram he had received reliable information on 31.7.2003 that the third appellant was sending appellants 1 and 2 to the International Airport with 2 Kgs. of heroin and that they were going to Riyad by Flight No.AI.927. He further stated that the information in writing was forwarded to PW.5, his superior officer and thereafter he along with PW.5 and CW2 went to the airport and kept surveillance. This witness further stated that at about 8.45 a.m he saw two persons each carrying a hand bag entering the Departure Terminal. They collected their boarding passes, moved to the emigration counter and after a while they returned to the Air India counter and after surrendering their boarding passes went out and got into the rear seat of an Indica car. PW1 further stated that he had noticed the driver and another person sitting in the car, identified themselves and conducted search of the body of appellants 1 and 2. This witness also deposed that before conducting

the search, he had enquired whether the accused required the presence of a Gazetted Officer and that it was only when they declined the offer that he had conducted the search. This witness further stated that the bags in the possession of accused Nos. 1 and 2 contained two packets which on examination was found to be heroin. Two samples were taken from the contraband articles and the bags with the contents and the samples were seized as per Ext.P7 mahazar. He further stated that the statements of the accused were recorded and they were arrested and the samples were sent for chemical analysis.

6. PW2 was the chemical analyst who analysed the samples taken by PW1 from the contraband articles seized from accused Nos. 1 and 2. Ext.P19 is the chemical analysis report. This witness had stated before the court below that he conducted certain tests to find out the nature of the substance which he had analysed. However, this witness had admitted that he had not conducted any quantitative analysis of the sample as the laboratory was not equipped with for conducting such a test.

7. PW3 is the village officer who proved Ext.P20 scene plan. PW.4 was the security personal at the airport on the day in question. He stated that he had witnessed the search and seizure of the contraband articles carried out by the officials, the arrest of the accused and also the sampling done at the airport. The evidence of PW.1 corroborates with the version given by PW.4. PW.5 was the superior officer of PW.1. He deposed that he received Ext.P1 information from PW.1 and had accompanied PW.1 to the airport on the day in question. The evidence of this witness corroborates with the evidence of PWs.1 and 4 in all material particulars. PW.6 conducted further investigation in the matter and filed the complaint against all the three accused. This witness stated that he took up the investigation of the case on 2.8.2003 and that he had conducted search in the house of the appellants as well as the branch of the Catholic Syrian Bank where the appellants had their accounts and also the ICICI bank. He further stated that as the driver of the car was not aware of the fact that the passengers were carrying the drugs, he was not implicated in the case.

8. To substantiate the case of the appellants, the appellants

examined the driver of the Indica car which was used by the appellants to go to Thiruvananthapuram. This witness stated that they left for Thiruvananthapuram at 11.30 p.m. on 30.7.2003 and reached A.V.M. Tourist Home, Thiruvananthapuram at about 3.45 a.m. the next day. He further stated that accused Nos. 1 and 2 left for the airport at about 6 a.m. This witness further stated that at about 8.45 a.m. two officials came to the room and took him and accused No.3 to the airport. He also stated that the officials seized his mobile phone, made him write certain things as instructed by them and also made him sign on certain packets. The court below analyzed the evidence of DW.1 and in the light of the evidence of this witness, the statements recorded under Section 67 of the N.D.P.S. Act and the recovery made by PW.1 found that the prosecution succeeded in proving the case against the appellants.

9. The main argument of the learned senior counsel appearing for the appellants is that the court below ought not to have accepted the evidence of the official witnesses with regard to the alleged seizure in the absence of any independent evidence to corroborate the same. Learned senior counsel also raised a contention that the alleged seizure from

accused Nos.1 and 2 was not in accordance with Section 50 of the N.D.P.S. Act. Ext.P2 series would show that notices were given to the appellants as well as DW.1 regarding their right under Section 50 of the N.D.P.S. Act for getting the presence of a Gazetted Officer before conducting search of their body. Ext.P2 series were signed by the accused and DW.1. Hence, the contention that there was violation of Section 50 of the N.D.P.S. Act is not sustainable. In this regard, learned senior counsel further submits that the signature seen in Ext.P2 series might have been put by the appellants on threat or even due to some promise made by the officers. It is seen from the evidence of PWs.1, 4 and 5 that appellants 1 and 2 handed over the bags which they were carrying to PW.1. The evidence of PW.4 creates some doubt regarding the identity of the bag which appellant No.2 had in his possession. PW.4 had stated that the bag which appellant No.2 was carrying was blue in colour whereas actually the bag was black in colour having blue border. Only because of the mistake committed by PW.4 with regard to the colour of the bag carried by appellant No.2, it is not possible to come to the conclusion that no such bags were seized from appellants 1 and 2. Hence, it can be concluded that the two bags seized from appellants 1 and 2 contained contraband

articles as alleged by the prosecution. The trial court accepted the evidence of these witnesses and acted on their evidence to find that MOs.11 and 12 were seized from the possession of appellants 1 and 2.

10. Regarding the contention that the court below went wrong in relying on the statements recorded under Section 67 of the N.D.P.S. Act, learned senior counsel relied on the judgment of the Bombay High Court reported in **Koyappakalathil Ahamed Koya v. A.S. Menon, 2002 Crl. L.J. 4502** wherein the Bombay High Court considered the evidentiary value of the statement recorded under Section 67 of the N.D.P.S. Act vis-a-vis the statement recorded under Section 108 of the Customs Act. In the above judgment, the Bombay High Court had categorically held that in Section 67 of the N.D.P.S. Act nowhere has the word 'evidence' been used and nowhere it has been indicated that such person who is being examined by such an officer in view of Section 67 of the N.D.P.S. Act is bound to state the truth as it has been indicated by Section 108 of the Customs Act. In this context it has to be noted that though the court below relied on Exts. P9, P11 and P13 statements of accused Nos.3, 1 and 2 respectively,

the court below had not considered the said statements as the only piece of evidence to find the accused guilty of the offences alleged against them. The court below also considered the evidence of PWs.1, 4 and 5 regarding recovery of the contraband articles as a corroborative piece of evidence to find the appellants guilty. The statements recorded under Section 67 of the N.D.P.S. Act was considered only as an assurance of the information that the accused committed the offences alleged against them. The question raised with regard to the evidentiary value of the statements recorded by an officer empowered under Section 42 of the N.D.P.S. Act can be considered in appropriate cases where the prosecution relies only on such circumstance. Hence, that question is left open.

11. The next question to be considered is whether the court below was justified in placing reliance on the evidence of PW.2 and Ext.P19 chemical analysis report to find that the appellants were in possession of diacetylmorphine or heroin so as to attract the offence punishable under Section 21 of the N.D.P.S. Act. PW.2 had stated that the samples received by him were analysed and that the result revealed that the samples were heroin. Ext.P19 would reveal that the tests conducted were

qualitative analysis test with regard to colour, appearance, odour, colour tests for diacetylmorphine, other colour tests and thin layer chromatography test. PW.2 had admitted that no quantitative test was conducted as the laboratory where the tests were conducted was not equipped with for that purpose. However, this witness stated that the samples analysed by him were heroin and that he was not in a position to find out the percentage of diacetylmorphine in the substance analysed by him by weight or by volume. So, it is clear from the evidence of PW.2 that no approved test was conducted to find out the actual quantity of diacetylmorphine or heroin in the samples. In this context, attention of this Court is invited to the United Nations publication on “Methods for Impurity Profiling of Heroin and Cocaine”. The above literature surmises many of the major and trace level alkaloidal impurities found in heroin and the methods for determination of the major components. The literature reads as follows:

"1. Hydrolysis of heroin

Post-processing hydrolysis can occur readily for those samples containing non-bound

water or excess acid. In those cases where both the alkaloidal content and the extent of hydrolysis are significant, the sample may become dark brown (almost black) and will finally become tar-like. In less severe cases, hydrolysis may not be obvious until the impurity profile data have been examined. An O6-monoacetylmorphine (O6MAM) content greater than 10% relative to the heroin is an indication that post-processing hydrolysis may have occurred in the sample. Other indicators are very low levels of O3-monoacetylmorphine (O3MAM) and relatively high morphine content (>1% relative to the heroin). In some cases both the morphine and the O6MAM can be present at a higher level than the heroin and, infrequently, even a significant amount of codeine. However, the analyst should be careful when making this assessment as a dark brown (black) tar sample containing high O6MAM can arise from causes other than post-processing hydrolysis. For instance, if a dark brown, tar-like sample contains high levels of O6MAM along with significant quantities of O3MAM and little or no codeine, then the sample could well have originated from a "homebake" process. Also the tar-like dark brown heroin samples that originate in Mexico typically have a processing-related O6MAM content higher than 6%, with 12% or greater (relative to heroin) not being at all uncommon. It is thus not always a simple matter to distinguish between heroin samples that have undergone significant post-processing hydrolysis and those samples where there was significant hydrolysis during processing. Not surprisingly, the task of comparing two samples where one has undergone significant post-process hydrolysis

versus one that has not undergone any significant hydrolysis, although not impossible, is very much more difficult.

Over time a properly prepared and stored heroin hydrochloride (or for that matter cocaine hydrochloride) will not degrade in any significant manner. In this context "properly prepared and stored" means fully hydrated +99.5% pure hydrochloride salt containing no unbound water or acid and stored in the dark at ambient temperature in a tightly sealed container. Obviously there are few properly prepared and stored drug samples in the illicit marketplace. As a result, some degradation over time is common for illicitly produced heroin, in particular when it is the free base, as the base is less stable than the hydrochloride salt. However, for high-purity illicit heroin samples the rate of degradation (hydrolysis) is so slow that it can be difficult to measure year-to-year.

The analyst does need to exercise care in order to avoid hydrolysis of the heroin when performing impurity profiling analysis. For instance, the hydrolysis rate for heroin is markedly increased at extremes of pH (e.g. pH < 3 and > 10) and as a result such routine tasks as liquid-liquid extractions need to be performed carefully. Gas chromatography (GC) is an analytical tool frequently used in impurity profiling and it can also result in hydrolysis of heroin and/or the trans-esterification of co-injection compounds. These problems are not limited to heroin, since most esters are more or less subject to these reactions, as is evidenced by

the well known formation of O6MAM when morphine and aspirin are dissolved in methanol and co-injected into a gas chromatograph. It is for these reasons that GC methods utilizing direct dissolution into an injection solvent may not provide as rigorous a result as do impurity profiling techniques that incorporate a derivatization. The previous two paragraphs apply equally to illicit cocaine.

GC analysis of heroin without the use of a derivatization step will result in the formation of three injection port artefacts. One of these compounds has not been identified (MW = 381), while the others are 15,16-didehydroheroin (34) and O6- monoacetylmorphine. An injection of a heroin sample, in the absence of a derivatization step, will nearly always result in the production of some quantity of O6-monoacetylmorphine in the injection port, where the amount so produced is a function of injection port temperature and the quantity of activation sites within the injection port. The unknown compound and 15, 16-didehydroheroin are usually observed at trace levels ($< 0.2\%$ relative to heroin) and chromatograph immediately after heroin on a 100% methylsilicone column. The presence of either of these two compounds at a level greater than 0.2% relative to heroin may suggest the need for injection port maintenance.

2. Methods for the determination of major components.

Methods for the determination of major impurities frequently incorporate quantification of the primary analyte, that is, heroin. The

remaining components in the sample may or may not be quantified and, if not, the response of these remaining components is typically set up as a ratio relative to the primary analyte. These methods are often referred to as screening methods, or ratio methods. In actual fact nearly all impurity profiling methods are ratio methods. A ratio method is one where the various components of the sample are separated, generally using a chromatographic technique, concomitant with the tabulation of response measurements followed by determining the ratios of the response measurements against either an added internal standard or a common sample component. Major impurity analysis are typically used to eliminate samples from comparison that are clearly different from other samples under examination or to obtain an indication of the heroin sample origin, that is, South-East Asia, South-West Asia, Mexico or South America.

All of the following methods are equally applicable to heroin base and heroin hydrochloride, although sample preparation may be different for base and hydrochloride samples. All methods should be regarded as guidance. In general, minor modification to suit local circumstances will not normally change the validity of the results. However, any modification must be carefully validated to ensure that the results have not been compromised. The analytical chemist should also be aware that not all methods described below are suitable for all types of heroin sample and that the probability that the method used provides a correct conclusion can vary significantly

depending on both the method employed and the exact nature of the sample."

12. Impurity profiling tests are conducted for court purposes and for intelligence purposes. It is to be noted that in an organic compound, drug characterization of the compound has to be decided by determining the major features of a drug sample, both by its physical and chemical characteristics including the presence and nature of cutting agents. A sample may contain foreign material and more than one element and it is necessary to find out the exact percentage or volume of diacetylmorphine present in the sample. Unless and until it is proved by adopting approved scientific methods including quantitative test, it is not proper to come to a conclusion that the samples analyzed were heroin. Even according to PW.2, the tests conducted by him would not show the exact percentage of diacetylmorphine contained in the samples. The purpose of finding out the purity of the samples is for enabling the court to determine whether the accused committed offence under any of the categories mentioned in Section 21 of the N.D.P.S. Act. The importance of this question arises when the accused is entitled to the benefit of the notification dated

19.10.2001 issued by the Government of India. The above notification gives benefit to the accused while penalty is imposed on him for having been found in possession of narcotic drugs in small quantity, intermediary quantity or commercial quantity, as the case may be. Sub-section (xxiia) of Section 2 of the N.D.P.S. Act defines "small quantity" as follows:

"small quantity" in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

Sub-section (viiia) of Section 2 of the N.D.P.S. Act defines "commercial quantity" as follows:

"commercial quantity" in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette."

Intermediary quantity is any quantity that comes in between small quantity and commercial quantity. The purpose of finding out the quantity of the

contraband articles seized is for fixing the liability of a person who is alleged to have committed the offence under Section 21 of the N.D.P.S. Act. Admittedly heroin is a narcotic drug, an opium derivative. Sub-section(xiv) of Section 2 of the N.D.P.S. Act defines narcotic drug as follows:

"narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods."

Sub-section (xvi) of Section 2 of the N.D.P.S. Act defines an opium derivative as follows:

" 'opium derivative' means.-

- (a) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;
- (b) prepared opium, that is, any product of opium by any series of operations designed to transform opium into an extract suitable for

smoking and the dross or other residue remaining after opium is smoked;

(c)phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;

(d)diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and

(e)all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine."

13. The prosecution case is that accused 1 and 2 were found in possession of 1 Kg. of heroin each. This Court has already found that as per the evidence of PW.2 and Ext.P19 chemical analysis report, it is not possible to find out the exact percentage of diacetylmorphine or diamorphine, which is an 'opium derivative', alleged to have been found in the possession of appellants 1 and 2 so as to conclude that the contraband articles seized from appellants 1 and 2 were heroine. In this context, the judgment of this Court reported in **Micheal Raj v. Intelligence Officer, 2005(2) Crimes 181** is also to be considered. In the above judgment, a learned Single Judge of this Court while dealing with an offence punishable under Section 21 of the N.D.P.S. Act pertaining to

manufactured drug held that the rate of purity is irrelevant when the offence alleged against an accused is one coming under Section 21 of the N.D.P.S. Act. But, the learned Judge had not considered the question regarding the purity of the substance seized or the exact percentage of diacetylmorphine contained in the sample. Admittedly, heroin or diacetylmorphine is a combination of more than one component and quantitative test has to be conducted to find out the exact percentage of the components which constitute the substance. The samples analysed by PW.2 would have contained molecules of other elements besides diacetylmorphine. In this context, the decision of the Delhi High Court reported in **Yogesh Tyagi v. State, 2004 Cri. L.J. 3907** is brought to the notice of this Court. Even though the factual situation considered in the above judgment was similar to that of the case in hand, the learned Judge held that any preparation weighing more than 250 grams containing diacetylmorphine of whatever potency it may be, will fall within the limits of commercial quantity which is sufficient to hold that the accused committed the offence punishable under Section 21 of the N.D.P.S. Act. This Court is of the view that in the light of the benefit contemplated under the notification dated 19.10.2001, before determining the offence

committed by an accused, it is necessary to get the data which would show the exact percentage of diacetylmorphine contained in the substance seized from the accused.

14. This Court has already found that from the evidence of PW.2 and Ext.P19 chemical analysis report, it was not possible to come to the conclusion whether the contraband articles seized from appellants 1 and 2 would come under the category of small quantity, intermediary quantity or commercial quantity. At the same time, the prosecution has succeeded in proving that appellants 1 and 2 were found in possession of contraband articles and that appellant No.3, the third accused, had assisted them for sale of the contraband articles. Hence, the question to be considered is whether the appellants can be convicted under Section 21(c) or 21(a) of the N.D.P.S. Act. The court below found the accused guilty for the offences punishable under Sections 21(c), 28 and 29 of the N.D.P.S. Act. This finding was on the basis of the prosecution allegation that the contraband articles seized from accused Nos. 1 and 2 weighed 1 Kg. each. This Court has now found that the prosecution has not succeeded in proving that the entire contraband articles seized from appellants 1 and 2

were heroine as Ext.P19 does not show the exact percentage of diacetylmorphine present in the substance analysed. However, the evidence of PW.2 would show that the sample analysed by him contained deacetylmorphine. In the above circumstances, it is only proper for this Court to hold that the appellants committed offences punishable under Sections 21(a), 28 and 29 of the N.D.P.S. Act. If that be so, the finding entered by the court below has to be altered from Section 21(c) to Section 21(a). As per Section 21(a) of the N.D.P.S. Act, the maximum punishment for an offence under this section is rigorous imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

15. In the light of the finding entered by this Court, the conviction and sentence ordered against the appellants by the trial court are set aside and the appellants are found guilty under Sections 21(a), 28 and 29 of the N.D.P.S. Act. The appellants are convicted thereunder and each of them are sentenced to undergo rigorous imprisonment for a period of six months under Section 21(a) of the N.D.P.S. Act. No separate sentences are awarded under Sections 28 and 29 of the N.D.P.S. Act. It is reported

that the appellants are in jail for more than three and a half years. Hence, the sentence of imprisonment is confined to the sentence already undergone by them. Therefore, the appellants, accused in S.C.No.62 of 2004 on the file of the Special Judge for Trial of Cases under the N.D.P.S. Act, Thiruvananthapuram shall be released forthwith, if they are not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

C.R.

K.THANKAPPAN, J.

CRL.A.NO.2168/2004

JUDGMENT

28TH MARCH, 2007.

